91-872

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY SALERNO, *et. al.*,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL E. TIGAR*
727 East 26th Street
Austin, Texas 78705
(512) 471-6319

GUSTAVE H. NEWMAN
NEWMAN & SCHWARTZ
641 Lexington Avenue
New York, New York 10022
(212) 308-7900

*Counsel of Record

QUESTION PRESENTED

Whether the Second Circuit properly applied familiar principles of federal evidence law in holding sworn former testimony admissible against the government in a criminal case when the issues were identical and the government had both motive and opportunity to cross-examine, within the settled meaning of Federal Rule of Evidence 804, when the former testimony was given.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Matthew Ianniello, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward J. Halloran, Aniello Migliore, and Alvin O. Chattin were parties in the court of appeals.

TABLE OF CONTENTS

Table of Contents

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

PRELIMINARY STATEMENT

Petitioner has misstated "fact" and "law," Supreme Court Rule 15.1. Its "modest proposal" would wreak a major change in the settled rules applied every day by federal courts in admitting former testimony. In summary, the petition:

I. Omits the factual context in which the Court of Appeals' unremarkable holding on the hearsay rule was issued,[1] including the story of how the prosecutors invited this result by their deliberate litigation choices in this and an earlier case;

II. (a) Misreads the plain text of Federal Rule of Evidence 804;

(b) Ignores the settled common law hearsay principles embodied in Rule 804 and sensibly applied by the Court of Appeals;

(c) Ignores the constitutional issues lurking in hearsay decisions in criminal cases;

(d) Invites this Court to turn back the clock on hearsay law to well before the Federal Rules of Evidence were adopted and announce a rule that would bar hearsay of a type routinely received in evidence by federal courts;

III. (a) Invents an *inter*circuit conflict where none exists;

(b) Misrepresents the views of a distinct minority of Second Circuit judges in an apparent effort to conjure an

---

[1] In this brief, we cite the Court of Appeals opinion to the petition appendix. This helps distinguish this case from an earlier *United States v. Salerno*, 868 F.2d 524 (2d Cir. 1989) ["*Salerno I*"].

conflict, though (i) no such conflict exists and (ii) the certiorari process is not the means to address it if it did exist;

IV. (a) Asks the Court to overturn settled principles of hearsay law by summary action; and

(b) Fails to acknowledge that the Court of Appeals judgment reflects its concern with a number of serious prosecutorial and judicial errors in the trial of this case.[2]

REASONS FOR DENYING THE WRIT

I
THE GOVERNMENT'S ADMISSIONS AND DELIBERATE TACTICAL CHOICES LED TO THE RESULT BELOW

This megatrial was, as the Court of Appeals found and the government now concedes, in reality four cases: 16 of 41 alleged RICO predicates dealt with bid-rigging in the construction industry, while substantial parts of the indictment alleged (a) fraud against the Teamsters Union, (b) labor payoffs, (c) a hot dog and buns extortion scheme at the Zoo and elsewhere, (d) gambling and loansharking, and (e) an alleged murder. The jury deliberated over several days and returned guilty verdicts on the bid-rigging counts and the hot dog case, acquitted on the murder charges, and returned mostly acquittals with a sprinkling of guilty verdicts on the Teamsters, labor, and gambling/loansharking charges. Petition, at 3, 6a - 11a.

[2] The petition is limited to a single issue. The Court of Appeals had before it dozens of reversible error points, the resolution and significance of which it would have to address if its Federal Rule of Evidence 804 conclusion were overturned.

In the construction part of the case, the government alleged that some defendants created a club of contractors who rigged bids on ready-mix concrete jobs and paid a percentage on each job to the defendants.

The Petition itself concedes that existence of and membership in the "club" were hotly disputed issues. The government had some intercepted conversations that it claimed supported its theory; none of these interceptions captured the voice of respondent Vincent DiNapoli, even though the goverment alleged he was a key figure in the alleged "club." Some contractors gave Fed. R. Evid. 801(d)(2)(E) testimony that "they had been informed . . . Cedar Park was a member" of the "club." A hearsay document of questionable authenticity and authorship purported to show that some defendants had an interest in Cedar Park. Petition, at 4.[3]

Given the hot dispute on a key factual issue, one would expect the defendants to seek out all relevant and potentially admissible evidence that might raise a reasonable doubt. But the government's petition minimizes the series of its own deliberate tactical decisions that led the defense to lay a basis for admitting the Bruno and DeMatteis testimony.

[3] On appeal, the defense attacked the admissibility of this document on the grounds, among others, that the authenticating handwriting "expert" had been rejected as an expert in prior judicial proceedings, was trained as an accountant, was not a member of the professional societies of questioned document examiners, and had based her opinion mainly on a photocopy of the questioned document. *See* Tr. 9872-98; *United States v. Wolfson*, 297 F. Supp. 881, 890 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 804 (2d Cir. 1969) (rejecting testimony of this witness).

The government concedes Bruno and DeMatteis were principals in Cedar Park, the very company at issue.[4] They had firsthand nonhearsay knowledge. DeMatteis is a successful builder with an excellent reputation. Neither Bruno nor DeMatteis has ever been charged with any wrongdoing in connection with an alleged "club." Neither has been charged with lying to the grand jury or to anybody else, despite the petitioner's cavalier characterization of their grand jury testimony as contrary to "clear evidence."

The petition admits, p. 3, the *government* informed the defendants before trial that Bruno and DeMatteis had testified before the grand jury under immunity and might have exculpatory information. So it was the government and not the defendants who first said in this case that these two men might have information a jury should consider.

The government leaves out of this concession a further compelling fact about its tactical choices. In an earlier trial, *Salerno I*, 868 F.2d 524, 542 (2d Cir. 1989), the government told defense counsel of Bruno and clearly knew of DeMatteis. At that trial, defense counsel did not subpoena Bruno, did not seek admission of the grand jury testimony, and did not establish that either man would invoke a privilege against self-incrimination. The government successfully argued to the Second Circuit that all these steps were necessary predicates to defense use of any exculpatory information Bruno or DeMatteis might have provided. 868 F.2d at 542. In addition, the DeMatteis testimony was held excludable because it did not

[4] DeMatteis has been described also as a principal in Metro Concrete. *See Salerno I*, 868 F.2d at 542.

relate to the same "issue" as that on which the *Salerno I* defendants were being tried.[5]

In this case, by contrast, the defense fulfilled all the predicates, as the Court of Appeals found. The district court's memorandum refusing to admit the evidence was based solely on its view that the government had not had "similar motive." Petition, at 42a-52a.

Given petitioner's repeated concessions on the importance of Cedar Park to its cause, traditional principles of evidence law, criminal procedure, and Sixth Amendment jurisprudence point towards admissibility and not away from it.[6]

II

THE PETITIONER HAS MISREAD THE PLAIN TEXT OF FEDERAL RULE OF EVIDENCE 80, AND IGNORED ITSCOMMON LAW BACKGROUND AND CONSTITUTIONAL BASIS

Rule 804 codifies a former testimony hearsay exception dating at least to the 19th century. See 5 Wigmore, Evidence § 1370 (Chadbourn rev. 1974) ["Wigmore"]); *Motes v. United States*, 178 U.S. 458, 471-73 (1900), cited with approval, *Pointer v. Texas*, 380 U.S. 400, 407 (1965). The petition is

[5] Here, the issue was whether Cedar Park was in the "club" and DeMatteis squarely negated that assertion. This shows that the Second Circuit is well aware of the similar issue requirements of Rule 804.

[6] We discuss these principles below, at II.

couched in terms of grand jury testimony offered by an accused.[7] The Rule, however, is much broader, and the sort of drastic limitation proposed by the government will have a decisive impact on civil, as well as criminal, cases in which former testimony is routinely admitted.[8]

The Court of Appeals amended its opinion to make clear that it was ruling solely on Rule 804(b)(1). Petition, at 41a. The distinct minority of active judges who dissented from denial of rehearing limited their concern with the amended opinion to the possibility that another panel of the court "might in the future" broaden the narrow reach of this panel's ruling. The prospect that a limited holding might be misapplied by a future court is hardly the stuff of which certiorari petitions should be made.[9]

In addition to unavailability, with which we deal below, Rule 804(b)(1) requires that the former testimony possess every guarantee of trustworthiness required by the adversary system except one: that the declarant be present in court before the

[7] Cases having to do with the government's attempted use of grand jury testimony are irrelevant to the issue presented by the petition, for by definition the accused can never have an "opportunity" to cross-examine such testimony. See Petition, at 21a (citing cases).

[8] Only a few Rules of Evidence make a distinction between civil and criminal cases, *e.g.*, Rules 201(g), 803(8)(C), usually in implied recognition of the defendants' Sixth Amendment and due process rights.

[9] At last count, there were twelve active judges in the Second Circuit eligible to vote on en banc rehearing. Only four of them voted to rehear. This is not even a majority of the non-panel members on the Court of Appeals.

trier of fact. The oath, personal knowledge[10], and the opportunity for cross-examination must all have been present. The justification for the former testimony exception, now as under pre-Rules caselaw, is necessity -- among the most venerable of justifications for dispensing with viva voce testimony. Wigmore finds the principle stated in Shakespeare. Wigmore § 1364, at 23-24.[11]

The Advisory Committee Notes to Federal Rule of Evidence 804(b)(1) state, "it may be argued that former testimony is the strongest hearsay" because all that is missing is presence. The Rule continues the limitations on the use of former testimony largely due to "tradition, founded in experience." *Id.*

Petitioner makes, and urges upon this Court, three fundamental -- indeed, elementary -- errors of law in discussing the former testimony exception. It misconstrues the term "opportunity," the term "similar motive," and the concept of "unavailability."

[10] All hearsay declarants must have personal knowledge. See Advisory Committee Notes to Federal Rules of Evidence 803, 804.

[11] Indeed, there is venerable authority that once there has been a chance at cross-examination by a party, the statement is thereafter nonhearsay and entitled to be admitted with the same dignity as if given again from the witness stand. Wigmore § 1370.

A. Opportunity to Cross-Examine

Bruno and DeMatteis were before the grand jury. They were given immunity, based on a decision by an Assistant Attorney General or some other high officer listed in 18 U.S.C. § 6003(b) that "their testimony or other information . . . may be necessary to the **public** interest [emphasis added]."[12] Petitioner presents a series of hypothetical reasons why it could have made, and did make, a deliberate tactical decision not to conduct a full examination of Bruno and DeMatteis in the grand jury.[13] These reasons are factually specious and legally irrelevant.

1. Petitioner's Factually Specious Arguments

An immunized witness may escape punishment altogether for any past wrongs he or she confesses. *See, e.g., United States v. Poindexter*, ___ F.2d ___, 1991 WL 235749 (D.C. Cir. 1991). The only prospect of temporal punishment that tethers such a witness to the truth is of a prosecution for perjury, as provided in 18 U.S.C. § 6002. Yet, as Chief Justice Burger taught in *Bronston v. United States*, 409 U.S. 352 (1973), in order to prosecute a witness for perjury, the examiner must tie him or her to the allegedly false story firmly

[12] Construing another part of the crime bill that brought us use immunity, this Court has said that the critical requirement of high official certification cannot be minimalized or trivialized. *United States v. Giordano*, 416 U.S. 505 (1974).

[13] In the discussion below, we show that the government's argument about "motive" to cross-examine is wholly fanciful. We refer to the grand jury interrogation of Bruno and DeMatteis as cross-examination because of their status as immunized witnesses objectively hostile to the prosecutors. See Fed. R. Evid. 609(c).

enough that the government can prove at a perjury trial that the witness spoke contrary to his or her belief.

Unless the grand jury process is a simply a school for uncorrected perjury by immunized witnesses, it is nonsense to claim the government has no reason to pin down a witness whose story it doubts.

Moreover, one searches the petition in vain for any reference to Federal Rule of Evidence 806, which would have permitted the government the same latitude in attacking Bruno and DeMatteis had their declarations been received as if they had taken the stand.[14]

2. Petitioner's Legally Irrelevant Arguments

Rule 804(b)(1), like its common law antecedent, makes it irrelevant why a party against whom hearsay is now offered did not cross-examine on the prior occasion. The reason can have been fanciful, or -- as claimed here -- to have involved the most serious concerns of prosecutorial discretion. Wigmore teaches us, first, that "the mere speaking under oath is not sufficient; the essential condition is that the person against whom the sworn statement is offered should have had an *opportunity to cross-examine* the deponent . . . . This is universally conceded as a common-law principle." Wigmore § 1377 (emphasis in original).

Equally strongly, however, Wigmore says, "The principle requiring a testing of testimonial statements by cross-examina-tion has always been understood as requiring, not necessarily an actual cross-examination, but merely an

[14] The government said in *Salerno I* that it would hand Bruno's grand jury testimony to the defense if he were called as a witness. 868 F.2d at 542 n.7. It backed down on this position in the present case.

opportunity to exercise the right to cross-examine if desired.... In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness. This doctrine is perfectly settled." *Id.* at § 1371. So, far from being questionable, Rule 804(b)(1) and the Court of Appeals' interpretation of it are "perfectly settled."

This Court has also treated the issue, forcefully and repeatedly, in criminal cases. We refer, of course, to the line of cases beginning with *California v. Green*, 399 U.S. 149 (1970), which found no constitutional objection to applying rules like 804(b)(1) to admit at an accused's trial testimony taken at a preliminary examination, provided only that the accused had the *opportunity* -- through counsel -- to cross-examine and the witness was unavailable for in-person examination at trial.[15]

The government has proposed a rule that would unsettle *all* this law, for parity in the right to introduce evidence is one foundation of the Sixth Amendment. *See generally* P. Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567 (1978); P. Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 95 (1974). The government does not propose, nor could it rationally, a rule that would permit introduction of prosecution-selected former testimony while excluding that offered by the defense under identical circumstances.

---

[15] The opportunity to cross-examine must have been meaningful in the sense that the accused was represented by counsel. *Pointer v. Texas, supra.* The unavailability principle is strictly enforced. *Barber v. Page*, 380 U.S. 719 (1968); *Motes v. United States, supra*, 178 U.S. at 472-73. Subject to these limitations, however, the principle dates at least to the 19th Century.

Any defense lawyer will tell you there are a dozen reasons not to conduct a vigorous cross-examination of preliminary hearing witnesses. Preliminary hearing strategy is usually to hide behind the log and see what evidence the government brings out. But if one of those witnesses dies, or leaves the country, or shows up at trial and invokes a privilege against self-incrimination, Rule 804(b)(1) and this Court's cases say the former testimony will probably come in.[16]

The government cannot legitimately claim surprise that a venerable common law rule has been applied against it. If it made a deliberate decision to forego some cross-examination of Bruno and DeMatteis, knowing full well they had given testimony that exculpated these defendants on an important issue, it must bear the consequences of its own deliberate bypass, its own procedural default.

Indeed, the Advisory Committee Notes to Rule 804(b)1) state that "[a]n even less appealing argument [for excluding the hearsay] is presented when the failure to develop fully [on cross-examination] was the result of deliberate choice."

One need not go back to the 19th Century to find settled law on this point which would alert a careful prosecutor of the consequences of tactical choices to forego examination. *United States v. Pizarro*, 717 F.2d 336 (7th Cir. 1983), was cited by the district judge, Petition, at 50a, in rejecting the defense motion to admit the former testimony.

The government does not cite Pizarro in its petition. Yet it is a case from the Seventh Circuit, the rationale of which

---

[16] *See also Glenn v. Dallman*, 635 F.2d 1183 (6th Cir. 1980), *cert. denied*, 454 U.S. 843 (1981) (preliminary hearing transcript comes in against defendant because defense counsel had a chance to conduct vigorous cross-examination but did not do so).

is in perfect agreement with that of the Second Circuit and which reverses a conviction for wrongful exclusion of the former testimony.

The government cites *United States v. Powell*, 894 F.2d 895 (7th Cir.), *cert. denied*, 495 U.S. 939 (1990), which it claims "conflicts with" the Second Circuit's decision in this case. *Powell* is irrelevant because the "testimony" was given at a plea hearing where the right to "cross-examine" does not exist in the sense required by the former testimony rule. This citation, coupled with petitioner's failure to discuss *Pizarro*, is misrepresentation.

Pizarro was tried three times. At his second trial, a codefendant named Rodriguez identified somebody other than Pizarro as the source of heroin. At the third trial, Rodriguez invoked his privilege. Pizarro offered the former testimony. Rodriguez was concededly unavailable. The Court of Appeals listened to the government's argument that it had foregone vital cross-examination in the earlier trial and held, after extensive analysis, that Rule 804(b)(1) required admitting the hearsay.[17]

So, the Court of Appeals' analysis of "opportunity" in this case was well within the bounds of Rule 804(b)(1) and the discretion exercised every day by experienced judges.

B. **"Similar Motive"**

The government directs much fire at the Court of Appeals' rejection of its "no similar motive" argument. It fails to understand that the argument is, in this context, trivial.

[17] The opinion was written by District Judge Neaher of the Eastern District of New York, sitting by designation. It bears noting that all the judges on the panel in this case were former federal trial judges, quite accustomed to making hearsay rule decisions on a common sense basis.

The old common law rule was that former testimony could be offered only against a party to the prior proceeding. Advisory Committee Notes to F.R.Evid. 804(b)(1). The rule was then expanded to permit introduction against those "in privity" with the party-opponent. *Id.* The Federal Rules of Evidence sought, in this as in so many other ways, to free the hearsay rule from artificial restrictions having no bearing on the intrinsic reliability of the declaration. *Id.*

In keeping with this expansive view, Rule 804(b)(1) permits a party to introduce former testimony against an opponent who was not even present at a former proceeding, provided only that the former opponent had "the right and opportunity to develop the testimony with similar motive and interest" to the opponent against whom it is now offered. *Id.*

Bluntly put, when former testimony is offered against the same party who once had a chance to cross-examine, the question of "similar motive" is irrelevant, provided the issues in the former proceeding and the present one are substantially identical.[18] The Court of Appeals in this case, and all the Courts of Appeals cases cited by petitioner, recognize and apply this unremarkable common-sense principle.

The only argument the government could make, consistent with the Rule and its official commentary, is that it lacked similar motive because the issues were completely dissimilar in the grand jury and at this trial. It did not make this argument. It could not do so with a straight face, because (a) the factual recitation in its petition dramatically illustrates that the issues were identical; (b) it represented to the Court

[18] The petition's statement, 13 n.6, that a statutory construction treatise is the "only authority" for the proposition that "similar motive" is irrelevant is belied by reading the Court of Appeals' opinion.

and counsel in a Brady submission that the former testimony was exculpatory, and (c) it characterized the testimony in *Salerno I* as not bearing an issue identical to the one in that case, in terms which foreclose it in the present case.

Some older cases took a narrow view of the requirement that issues and parties be identical. Wigmore and other authorities derided these limitations, Wigmore §§ 1387 (issues), 1388 (parties), and the Rule dispenses with them.[19] The Advisory Committee that drafted the rule intended the very sort of interpretation the Second Circuit used in this case, in harmony with what the Committee called the "modern decisions."

We can illustrate the havoc the government's proposed rewriting of Rule 804(b)(1) would wreak by describing a typical multidefendant civil antitrust case. Plaintiff notices the deposition of an officer of Defendant A. Counsel for Defendants A, B, C, and D show up and "defend" the deposition by interposing objections. Often, they ask no questions. They count on being able to call the witness at trial, so the deposition will be used only for impeachment. After all, millions of dollars may be at stake in the litigation, and asking questions would only give away the defense strategy.

As every civil lawyer knows, this all works just fine until Defendant A settles and won't make the witness (who we will suppose lives outside the civil subpoena range) available, or the witness dies, or maybe (in an antitrust case) the witness decides that the privilege against self-incrimination isn't such a bad idea after all.

---

[19] Distinguished courts had already begun to chip away at the common law restrictions. *See, e.g., Fleury v. Edwards*, 14 N.Y.S.2d 334, 200 N.E.2d 550 (1964) (Fuld, J.).

The government wants to read Rule 804(b)(1) so that Defendants B, C, and D have a good argument for keeping the deposition out of evidence. This is nonsense.

C. "Unavailability"

So far, we have shown that the Court of Appeals' decision represents a sensible and limited approach in terms of Rule 804(b)(1) itself. Even if one were to say that Bruno and DeMatteis were unavailable to the government, settled law makes their former testimony admissible. The Court of Appeals' view that they were *not unavailable* to the government was not necessary to such a conclusion.

Nonetheless, the Court of Appeals was right, and the government jumps over a lot of law in saying otherwise. It reserves its most ardent sarcasm for the Court of Appeals' treatment of "unavailability." Yet that treatment deliberately and expressly (a) excludes from consideration cases in which grand jury testimony is offered by the government, and (b) does not construe the residual exception in Rule 804(b)(5) or any other portion of Rule 804(b).

The government seems most exercised at the panel's use of general statutory construction principles in deciding the meaning of unavailability. Yet, given the plain language of Rule 804(a) and its common law background, such authority is precisely where one must turn.

As the Advisory Committee Notes make clear, unavailability was not the subject of consistent doctrine before the Rules. The drafters unified the standards, although recognizing that a defendant's Sixth Amendment confrontation rights would lead to differential treatment of civil and criminal cases and -- in the latter -- as between criminal defendants and the government. As we said above, the drafters considered eliminating

the unavailability requirement altogether for former testimony. *Id.*

1. **The Constitutional Issue**

The Court of Appeals did not reach the constitutional issue. The government ignores it. To say this hearsay is inadmissible requires resolving that issue against the defense in the teeth of this Court's decisions. No rule of evidence may be construed to exclude reliable hearsay offered by a defendant who requires the evidence for his defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973), discussed and analyzed in P. Westen, *supra*.

This is a particular application of a general rule forbidding use of evidence rules to preclude presentation of evidence in support of a defense theory. *Compare Davis v. Alaska*, 415 U.S. 308 (1974) (state may not invoke juvenile record sealing rule to cut off cross-examination of prosecution witness). *See generally* W. LaFave & J. Israel, Criminal Procedure § 23.3 (1985).

2. **Unavailability in Context**

The Rule speaks of "unavailability." Unavailability to whom? Because the admission of the former testimony rests on "necessity," the proponent must generally show unavailability *to himself* of the live testimony. *Compare* Wigmore § 1414. For example, if a witness called by the government decides, through fear of or connivance with the defendant, not to testify, that witness is unavailable in the only way the rule requires, and a prior hearsay statement will be received. *See* 4 Weinstein & Berger, Federal Rules of Evidence ¶ 804(a)[01], at 804-36 n.8 and accompanying text.

The cases cited in the Weinstein-Berger treatise represent application of the same principle applied by the Court

of Appeals in this case. The fearful or conniving witness is not unavailable to the defendant, who can with a few well-chosen words secure his testimony. The government's proposed double unavailability principle has no basis in the Federal Rules of Evidence, invites evidentiary gamesmanship in civil and criminal cases, and harkens back to the rigid "same case" and "same parties" limits ridiculed by every discerning commentator since Bentham and abolished by the Rule.

The petition says, at 20, that the Court of Appeals' decision will somehow force the government to grant immunity "as the price of having the courts apply the rules of evidence according to their terms." The Second Circuit expressly reaffirmed cases holding immunity grants "pre-eminently a function of the Executive Branch." Petition at 23a. So the petition contends, unsupported and unsupportably, that the Court of Appeals did not mean what it plainly said.

Nothing in the Court of Appeals' opinion compels an immunity grant. The government has already, under the Court of Appeals' test, had the opportunity to cross-examine the former testimony on the same issue. If the proponent does not establish these two predicates, the former testimony would be inadmissible.[20] The government may, but is not compelled to, grant immunity only if it wants more cross-examination than the rule entitles it to, and more than any other litigant would be entitled to.

In civil cases, admission of the deposition of a corporate officer outside the subpoena range should turn on the officer's unavailability to the proponent. Obviously, the officer is not unavailable to the corporate defendant. Yet the deposition is

---

[20] These predicates are preliminary facts. Fed. R. Evid. 104.

admissible. Again, this is the principle the Court of Appeals applied.

The rule cannot be read otherwise. The last paragraph of 804(a) says that "the proponent" cannot take advantage of an unavailability obtained by his or her procurement or wrongdoing.[21] The rule is silent as to the role and responsibility of the opponent, and the Court of Appeals sensibly declined to go any further than the text required and properly cited a general principle of statutory construction.

If one does go beyond the rule's text, into its common law antecedents and constitutional underpinnings, the same result follows. The state may not intimidate a witness and make him unavailable. *Webb v. Texas*, 409 U.S. 95 (1972). The state may not use hearsay until it tries every discretionary means to obtain live testimony. *Compare Barber v Page, supra*, with *Ohio v. Roberts*, 448 U.S. 56 (1980).

The Court of Appeals did discuss the fairness and common sense of its holding. After all, this Court and the Courts of Appeals have developed a substantial body of criminal procedure law on use of hearsay in criminal cases. This law is based on two principles, necessity and reliability, whether the hearsay is offered by the state or by the accused. *Compare Chambers v. Mississippi, supra*, with *Ohio v. Roberts, supra*. The petition does not mention any of this significant

---

[21] This requirement is of constitutional dimension in criminal cases. *See Motes v. United States, supra*. In *Motes*, the hearsay was inadmissible because the government negligently let the witness escape custody and become unavailable. There was no showing of culpable wrongdoing. By a parity of reasoning, the Court of Appeals need not have found culpability by the government to hold the witness not unavailable to it.

caselaw; it merely argues for a rule that would put it all into question.

III

THERE IS NO INTERCIRCUIT CONFLICT

Petitioner says, at 15-16, that the Seventh, Third, Fifth, and D.C. Circuits hold differently. This assertion is nonsense.

In a footnote, 15 n.9, petitioner also says the Second Circuit is at odds with itself. In *United States v. Serna*, 799 F.2d 842 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987), the defendant sought to introduce the testimony of his alleged coconspirator at the latter's trial. The Court of Appeals held the government had not had a similar motive to examine the coconspirator because the contested issues were different. In this case, the Court found the issues were the same; the petition's own statement of facts supports this view. In *Salerno I*, the Court held the same hearsay properly excluded, in part because the issues were not the same.

The Second Circuit seems to know what it is doing on this issue, even granting the novel premise that certiorari is a means to resolve *intra*circuit conflicts.[22] The four judges who wanted en banc reconsideration ended their dissent with a clear statement that they were more worried with what the decision might be read as permitting than with what it held. Such prospective concerns are hardly the basis for exercise of certiorari power.

---

[22] Judge (now Chief Judge) Oakes authored *Serna*. Had he thought the opinion endangered by this panel's holding, he presumably would have voted to rehear en banc. He did not.

tation. The other allegedly conflicting decisions are also not as claimed.

In *United States v. Lowell*, 649 F.2d 950 (3d Cir. 1981), the properly excluded hearsay was a guilty plea allocution sufficient to make a Fed. R. Crim. P. 11 factual basis. As the Third Circuit noted, there was no cross-examination at all to speak of, and no similarity of issues.

The same is true of the Fifth Circuit's opinion in *United States v. Atkins*, 618 F.2d 366 (5th Cir. 1980). The issues in the two proceedings were different.

Thus, in the Seventh, Third, and Fifth Circuit cases, the former cross-examination could not be a substitute for present cross-examination. It is astonishing that the government should cite these cases at this procedural hour, for it never claimed in the Court of Appeals or the district court that DeMatteis' and Bruno's grand jury appearance involved an issue different from that on which the hearsay was offered at trial in this case. Indeed, one reads the petition in vain to find any such contention in this Court.

The citation to *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 2235 (1991), is similarly malapropos. Exclusion of Poindexter's videotaped Congressional testimony was based on the evident principle that the Congressional hearing "opponent" was different from the North trial "opponent." Indeed, North's prosecutors had been forbidden to have anything at all to do with the Poindexter examination or even to watch it on television. 910 F.2d at 906.

The cases cited in the petition, at 17, are, broadly speaking, based on the same rationale as the Court of Appeals' decision here.

IV
THE SUGGESTION OF SUMMARY ACTION IS GROUNDLESS

The Court of Appeals' opinion in this case was written after the panel of experienced federal judges had read several hundred pages of briefs that did not duplicate one another's discussion, heard three hours of argument by eight advocates, and reviewed a record many thousands of pages long that led to joint appendices running to more than one thousand pages. Petition, at 13a-14a.

The portion of the opinion dealing with hearsay discusses all relevant prior Second Circuit law, including *Salerno I* (Judge Pratt on the panel), which dealt with the same testimony here at issue and found it properly excluded. The Court of Appeals also discusses the law of other circuits, the relevant cases from this Court, and leading treatises and articles.

The suggestion, Petition at 23, that summary reversal (without review of the record and full argument) is appropriate is a studied insult to the deliberative process.

The insult is compounded when one considers that the government's proposed rule would cut across the entire field of former testimony as now offered in federal trials. It is surprising to see the government trying to turn the clock back to rigid and technical rules that prevent a jury from hearing reliable evidence on the merits, when the Federal Rules of Evidence are expressly consecrated to different principles. Fed. R. Evid. 102.

There is, perhaps, a further lesson to be drawn from reading the Second Circuit's opinion. In this megacase, the pattern and enterprise requirements of RICO were stretched to

and perhaps beyond the breaking point. The most disparate charges against different defendants were patched together to create a trial that enhanced the possibility of jury confusion and prejudicial spillover. *See* Petition, at 2a-11a.

The district judge cut off one defendant's right of effective cross-examination and excluded another defendant from pointing out that the government had taken two diametrically opposed positions in two cases in which he was involved. There was a serious issue of judicial and court officer interference with jury deliberations, as to which the panel expressed grave reservations about the district judge's equivocal denial of wrongdoing.

CONCLUSION

This case possesses none of the qualities that invoke the certiorari jurisdiction: the Court of Appeals' unremarkable holding rests on routinely applied principles of evidence law, and no Court of Appeals disagrees with the Second Circuit's rationale. The petition is rife with errors and omissions. Certiorari should be denied.

Respectfully submitted,

MICHAEL E. TIGAR
727 East 26th Street
Austin, Texas 78705